

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

10/11/2001

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

M. Cearfoss
Deputy

LC 2001-000135

FILED: _____

STATE OF ARIZONA

SAMUEL K LESLEY

v.

TODD MATTHEW WARREN

W CLIFFORD GIRARD JR

PHX MUNICIPAL CT
REMAND DESK CR-CCC

RULING
REVERSE/AFFIRM
REMAND

PHOENIX CITY COURT

Cit. No. 5829500

Charge: 1. DUI-ALCOHOL
 2. DUI AC .10 OR HIGHER
 3. IMPRUDENT SPEED

DOB: 06-25-1971

DOC: 11-16-1999

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Section 12-124(A).

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This matter has been under advisement since the time of oral argument on September 24, 2001. This decision is rendered within 30 days as required by Rule 9.8, Maricopa County Superior Court Local Rules of Practice. This Court has considered the record and transcripts of the proceedings from the Phoenix City Court, the memoranda and arguments of counsel.

Appellant, Todd M. Warren, was arrested on November 16, 1999, and charged with Driving While Under the Influence of Intoxicating Liquor, a class 1 misdemeanor, in violation of A.R.S. 28-1381(A)(1); Driving with a Blood Alcohol Content of .10 or Greater, a class 1 misdemeanor, in violation of A.R.S. 28-1381(A)(2); Imprudent Speed, a civil traffic violation, in violation of A.R.S. Section 28-701(A). Appellant was found guilty after a jury trial concluding on March 2, 2001.

The first issue raised by Appellant concerns the prosecutor's comment during his closing argument that the HGN Test¹ could be considered as independent evidence that Appellant had a .10 or greater blood alcohol content at the time of his driving.² Appellant's counsel moved for a mistrial at the conclusion of the prosecutor's closing argument³ and, the trial judge denied the motion for mistrial.⁴

This Court concludes that the trial judge erred in not granting a mistrial as to Count 2. The Arizona Court of Appeals has explicitly stated:

This evidence (the HGN Test) should not have been admitted as direct, independent evidence to quantify defendant's BAC (blood alcohol content) level. [Citation omitted.] Therefore, the trial court correctly entered

¹ Horizontal Gaze Nystagmus Test.

² Reporter's Transcript of March 2, 2001, at p. 259.

³ Id. at p. 261.

⁴ Id.

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a directed verdict on Count 2 following the
jury's verdict.⁵

IT IS THEREFORE ORDERED reversing the judgment and sentence
as to Count 2 only.⁶

IT IS ORDERED affirming Appellant's conviction for Count 1,
Driving While Under the Influence of Intoxicating Liquor, a
class 1 misdemeanor, in violation of A.R.S. Section 28-
1381(A)(1).

IT IS FURTHER ORDERED remanding this case back to the
Phoenix City Court for all future proceedings, which may include
a new trial on Count 2.

⁵ State v. Cannon, 192 Ariz. 236, 239, 963 P.2d 315, 318 (App. 1998).

⁶ Because this Court has reversed Appellant's conviction on Count 2, this Court does not address Appellant's contention that there was insufficient evidence to warrant conviction on Count 2, the Driving with a Blood Alcohol Content Greater Than .10, in violation of A.R.S. Section 28-1381(A)(2).